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June 14, 2019

***Via First Class Mail and Email***

Maine Land Use Planning Commission  
c/o Bill Hinkel, Regional Supervisor  
22 State House Station,  
Augusta, Maine 04333-0022

**Re: New England Clean Energy Connect – Initial Brief of Western Mountains & Rivers Corporation**

Dear Mr. Hinkel,

Enclosed, on behalf of Western Mountains & Rivers Corporation ("WM&RC" or "Group 7"), please find one (1) original and nine (9) copies of WM&RC's Initial Brief along with Proposed Findings of Fact for the consideration by the Commission.

Please let me know if you should need additional information.

Sincerely,



Benjamin J. Smith, Esq.

BJS:bjs  
cc: Service List (via email)  
Enclosure

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June 14, 2019

***Via First Class Mail and Email***

Maine Dept. of Environmental Protection  
c/o James Beyer,  
106 Hogan Road, Suite 6  
Bangor, ME 04401

**Re: New England Clean Energy Connect – Initial Brief Western Mountains & Rivers Corporation**

Dear Mr. Beyer,

Enclosed, on behalf of Western Mountains & Rivers Corporation ("WM&RC" or "Group 7"), please find one (1) original and four (4) copies of WM&RC's Initial Brief along with Proposed Findings of Fact for the consideration by the Department.

Please let me know if you should need additional information.

Sincerely,



Benjamin J. Smith, Esq.

BJS:bjs  
cc: Service List (via email)  
Enclosure

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
and  
STATE OF MAINE  
LAND USE PLANNING COMMISSION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY	)	
NEW ENGLAND CLEAN ENERGY CONNECT	)	
#L-27625-26-A-N/#L-27625-TG-B-N/	)	
#L-27625-2C-C-N/#L-27625-VP-D-N/	)	
#L-27625-IW-E-N	)	INITIAL BRIEF OF WESTERN
	)	MOUNTAINS & RIVERS
CENTRAL MAINE POWER COMPANY	)	CORPORATION
NEW ENGLAND CLEAN ENERGY CONNECT	)	
SITE LAW CERTIFICATION SLC-9	)	
Beattie Twp, Lowelltown Twp, Skinner Twp,	)	
Appleton Twp, T5 R7 BKP WKR,	)	
Hobbs town Twp, Bradstreet Twp,	)	
Parlin Pond Twp, West Forks Plt, Moxie Gore,	)	
The Forks Plt, Bald Mountain Twp, Concord	)	
Twp	)	

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**I. INTRODUCTION**

Western Mountain & Rivers Corporation ("WM&RC") hereby files the following initial brief in the above proceedings before the Maine Department of Environmental Protection ("DEP" or "Department") and the Land Use Planning Commission ("LUPC" or "Commission") to address issues raised at the April and May hearings and identified in procedural orders issued by the DEP and LUPC issued respectively on October 5 and October 9, 2019, relating to the applications of Central Maine Power Company ("CMP") in the above proceedings.

**II. SUMMARY OF HEARING CRITERIA TO BE ADDRESSED**

In the Second Procedural Order of the DEP, the following issues arising under the DEP's jurisdiction were identified for hearing:

- Scenic Character and Existing Uses (38 M.R.S. § 480-D(1), 38 M.R.S. § 484(3), DEP Rules Chapters 315 and 375 § 14)
- Wildlife Habitat and Fisheries (38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), and DEP Rules Chapters 335 and 375 § 15)
- Alternatives Analysis (38 M.R.S. §§ 480-D (1) & (3), 38 M.R.S. § 484(3), DEP Rules Chapters 310, 315, and 335)
- Compensation and Mitigation (38 M.R.S. § 480-D, 38 M.R.S. § 484(3), DEP Rules Chapters 310 and- 375 § 15)

In the LUPC's Second Procedural Order, the Commission identified the issues for hearing as follows:

The Commission must certify to the Department (a) whether the Project is an allowed use within the subdistricts in which it is proposed and (b) whether the proposed Project meets any land use standards established by the Commission that are not duplicative of those considered by the Department in its review of the Project under the Site Law. 12 M.R.S. § 685-B(1-A)(B-1). Within a Resource Protection (P-RR) subdistrict, a utility facility is allowed by special exception. For the Commission to find a use is allowed by special exception, the Commission must find that an applicant has shown by substantial evidence that (a) there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant; (b) the use can be buffered from those other uses and resources within the subdistrict with which it is incompatible; and (c) such other conditions are met that the Commission may reasonably impose in accordance with the policies of the Comprehensive Land Use Plan. *Land Use Districts and Standards*, 01-672 C.M.R. 10 (Chapter 10), section 10.23, I, 3.d.

### **III. SUMMARY OF ARGUMENT**

The purpose of the New England Clean Energy Connect ("NECEC" or the "Project") is to deliver up to 1,200 MW of renewable electricity from Quebec, Canada to the ISO New England electric grid via an overhead transmission line and consistent with the terms of the 2017 Massachusetts RFP. The Project is proposed along land that CMP already owns or controls, and the great majority of the Project is to be collocated along existing CMP transmission corridors.



The Project has been designed to ensure that it will not have an unreasonable adverse impact on the scenic, aesthetic, navigational and recreational values of the areas that it crosses. CMP's design of the Project, including areas along the remote portion of segment 1 from Harris Station to the Canadian border, seeks to use natural buffers such as topography, existing vegetation, and other features to minimize the impact of the Project. CMP has proposed buffer strips to minimize the visual impacts of the Project, protect and maintain water quality, and facilitate movement of wildlife across adjacent areas of the corridor. Where the Project is located within the P-RR subdistrict, it will be sufficiently buffered from other uses, and/or is not incompatible with existing uses within such areas, meeting the LUPC's special exception criteria for utility facilities.

As has been found by the Maine Department of Inland Fisheries and Wildlife ("MDIFW"), the Project will not unreasonable harm or adversely impact wildlife habitat or travel corridors through habitat fragmentation or other intrusions. Disruption to wildlife has been minimized wherever possible, and the Project does not unreasonably affect the ongoing use of the Project area by existing wildlife, especially when compared to potential design alternatives. CMP has included buffer strips around cold water fisheries to the satisfaction of MDIFW, which will also facilitate habitat connectivity along the corridor.

There are no reasonably available or suitable alternatives to the proposed location and design of the Project that would minimize its impact upon the environment or existing recreational, aesthetic, scenic, or other uses of areas adjacent to the Project without unreasonably increasing the costs and/or defeating the purpose of the Project. There is no reasonable alternative to the crossings of the outstanding river segments

that would have less adverse effect upon these rivers.<sup>1</sup> There are no alternative sites to the locations where the Project is located in the P-RR subdistricts that are both “suitable” to the proposed use and “reasonably available” to CMP.

CMP's compensation and mitigation plan adequately compensates for all impacts to cold water fisheries, outstanding river segments, and wetlands that cannot be avoided, and no additional compensation has been recommended by the MDIFW for any unreasonable impact upon wildlife habitat.

#### **IV. ARGUMENT**

##### **A. The Project Meets the Department's Requirements Surrounding Scenic Character and Existing Uses and Also Meets the Commission's Requirements Surrounding Compatibility and Buffering for Visual Impacts Within the P-RR District.**

In order for a proposed development activity to meet the Department's standards relating to “Scenic Character and Existing Uses,” which include scenic/aesthetic uses as well as recreational and navigational uses, “[t]he activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.” 38 M.R.S. §480-D (1). Under Rule Chapter 315 “[u]nreasonable adverse visual impacts are those that are expected to unreasonably interfere with the general public's visual enjoyment and appreciation of a scenic resource, or those that otherwise unreasonably impair the character or quality of such a place.” DEP Rule Chapter 315, § 4.

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<sup>1</sup> The five outstanding river segments are the Kennebec River below Wyman Dam, Carrabassett River, Sandy River, the West Branch of the Sheepscot River, as well as the area of the upper Kennebec River known as the Kennebec Gorge. With the exception of the Kennebec Gorge, all of the other outstanding river segments CMP has minimized visual impacts by co-locating the HVDC line within an existing transmission corridor. As more fully explained below, for the Kennebec Gorge, CMP has proposed to use horizontal directional drilling (“HDD”) technology to avoid visual impacts to that outstanding river segment and fully preserve the aesthetic character of this section of the Kennebec River and buffer any transmission facilities, termination stations, or other associated facilities from those using the river for recreational and other purposes.



In order for utility facilities such as those proposed under the Project to qualify for a “special exception” under the LUPC’s governing statute and rules, an applicant must show by substantial evidence that: (a) there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant, and (b) the use can be buffered from those other uses and resources within the subdistrict with which it is incompatible. 12 M.R.S. § 685-B(1-A)(B-1); *Land Use Districts and Standards*, 01-672 C.M.R. 10 (Chapter 10), section 10.23, I, 3.d.

Evidence in this proceeding supports a finding that the Project, as proposed by CMP, Meets the Department’s and the LUPC’s requirements. The NECEC crosses three separate P-RR subdistricts: near Beattie Pond in Beattie Twp; at the Upper Kennebec River between Moxie Gore and West Forks Plt; and at the Appalachian Trail in Bald Mountain Twp.

In the case of the West Forks Plantation and Moxie Gore subdistrict (Kennebec Gorge crossing area), CMP modified its application to cross beneath the river using HDD. Witness testimony and CMP’s application support a finding that use of HDD to cross the Kennebec meets the Department’s criteria as it eliminates any potential adverse impact on scenic, aesthetic, navigational, and recreational uses, and also meets the LUPC’s criteria. Larry Warren, on behalf of Group 7, an intervenor whose members have considerable experience in Maine’s outdoor recreation and nature-based tourism industry, stated:

[T]he NECEC seeks to minimize the adverse impact of the Project on recreational, navigational, aesthetic, scenic and other uses of lands and other natural resources.... The record provides substantial evidence that any interference associated with the scenic, aesthetic, recreational or navigational uses will be minimal and will be more than offset by the significant benefits [of the Project].

Larry Warren February 27, 2019 Direct Testimony at 8. Joe Christopher, another witness and member of Group 7, similarly stated:

The NECEC seeks to preserve the scenic, aesthetic and recreational character of existing resources impacted by the NECEC, including the Kennebec River and Gorge. At the same time, the NECEC will increase public access and recreational opportunities, thereby creating new opportunities for enjoyment and use of these important natural resources for generations to come.

February 27, 2019 Joe Christopher Direct Testimony at 7.

With regard to the LUPC's criteria, the record supports a finding that the Project termination stations and other facilities are not even located within the P-RR subdistrict due to the design of the HDD crossing. As explained in CMP's February 28, 2019 pre-filed direct testimony:

The Project corridor crosses the P-RR subdistrict associated with the Upper Kennebec River in West Forks Plt and Moxie Gore. The P-RR subdistrict extends 250 feet from the normal high-water mark on both sides of the river. The transmission line within the horizontal directional drill (HDD) crossing is entirely underground as it passes below (and therefore not within) the P-RR subdistrict. The termination stations on either side of the river are located outside the P-RR subdistrict. Plans of the HDD crossing are attached hereto as Exhibit CMP-8-I.

The HDD installation and the development of the termination stations will not be visible from the P-RR subdistrict and therefore visual impacts to recreational users will be avoided. An underground crossing of the Upper Kennebec River would have no impact on the P-RR subdistrict or its intended purpose.

February 28, 2019 Brian Berube Direct Testimony at 14; see Exhibit CMP-8-I. From this testimony the record supports a finding that the HDD crossing of the upper Kennebec River in the vicinity of the Kennebec Gorge does not implicate the LUPC's criteria.

However, even if this crossing was within the P-RR subdistrict, because none of the Project facilities are within 250 feet of the river (but rather are 1,200 feet away) and



are not visible from areas within the 250 foot P-RR zone, the only conclusion that could be supported by the record is that the Project has been more than adequately buffered from any potential incompatible uses.

Finally, even if Project facilities were located in the West Forks Plt and Moxie Gore P-RR subdistrict, the termination stations and associated facilities are not incompatible with other similar uses within that subdistrict. As shown by the Rebuttal Testimony of Joe Christopher, this P-RR subdistrict already has a large concrete hydro-electric dam, power house/buildings, transmission lines, and other related electricity infrastructure. March 25, 2019 Joe Christopher Direct Testimony at 1-2 and Exhibits 1-8 thereto. Thus, even if the termination stations and Project facilities were within the P-RR subdistrict, these facilities would be compatible with other uses within the subdistrict.

With regard to the P-RR subdistrict consisting of Beattie Twp., Lowelltown Twp., Skinner Twp., and Merrill Strip Twp. (near Beattie Pond), CMP has proposed a redesign of the Project facilities as part of its January 2019 filing that adequately buffers Project facilities, including structures and transmission lines, from Beattie Pond and have proposed that vegetation be retained in order to further minimize the visual impact of the corridor. Specifically, CMP, as part of its January 2019 filing, proposed using shorter structures in the location of Beattie Pond to minimize its visual impact and visibility to recreational users of that pond. Ms. Segal, at the April 1<sup>st</sup> hearing, stated:

So in working with the engineers and recognizing the visibility of those structures, we went back and worked with them in January 2019, submitted this revision, which the tip of the structure is just barely visible over the tree tops there. The structure was reduced in height of about 39 feet.



April 1<sup>st</sup> Tr. at 307:23-25 – 308:1-4. This design modification is reasonable and meets the DEP's and the LUPC's criteria. Further, for the reasons discussed in Parts IV(E)(1) and (2) below, other design modifications, including use of taller poles, increased vegetation and tree height in portions of the corridor, and increased tapered vegetation along the entirety of segment 1, would not likely further enhance the aesthetic impacts but would increase cost and increase the environmental impact of the Project.

The Appalachian Trail crosses the proposed Project facilities (and existing transmission facilities owned by CMP via an easement held by the National Park Service on CMP fee-owned land) in three locations adjacent to Moxie Pond in Bald Mountain Township. CMP has proposed to co-locate the new transmission line within the existing transmission line corridor. This approach is reasonable and satisfies the Department's and the Commission's criteria because it will help prevent environmental damage, will reduce the adverse visual impact of the Project by co-locating the Project along existing transmission lines, and is the most practicable alternative. Other alternatives, including undergrounding of the Appalachian Trail or other areas, are impracticable and unreasonable given the reasons discussed in Part IV(E)(1) below.

**B. There is No Credible Evidence That the Project Will Unreasonably Affect the Aesthetic, Scenic, Recreational, Navigational, and Existing Uses of Areas Adjacent to the Project.**

Recreational activities along the corridor will not be adversely impacted by the Project. Joe Christopher, a lifelong Mainer, resident of West Forks, and owner of various outdoor recreation and nature-based tourism businesses in western Maine, testified as follows:

MS. GILBREATH: ... [I]s an electric transmission line incompatible with hiking uses?

JOSEPH CHRISTOPHER: I don't believe it is.

MS. GILBREATH: Is it incompatible with hunting uses?

JOSEPH CHRISTOPHER: I don't believe it is.

MS. GILBREATH: Is it incompatible with rafting uses?

JOSEPH CHRISTOPHER: Certainly not. We use the releases provided by those facilities and transmission of those facilities to get the releases that we raft on a daily basis.

MS. GILBREATH: Is it incompatible with snowmobiling uses?

JOSEPH CHRISTOPHER: Some of the best trails in Maine are on transmission lines.

MS. GILBREATH: So is it your opinion that recreational users are deterred by the existence of a transmission line?

JOSEPH CHRISTOPHER: I would disagree with that.

April 2 Tr. at 275:3-25.

With regard to snowmobiling, some intervenors, including Elizabeth Caruso and Greg Caruso, have argued that snowmobile riders only use trails located along transmission lines as a means of egress to other trails.<sup>2</sup> At hearing, however, Greg Caruso conceded that snowmobile trails are co-located on longer segments with transmission lines and are not simply a means of egress.<sup>3</sup> He also acknowledged the testimony of CMP's witness, Justin Tribbet, that of the total transmission lines owned by

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<sup>2</sup> "Egress" means "[t]he path or opening by which a person goes out; exit." or "[t]he means or act of going out." *Black's Law Dictionary* 515 (6<sup>th</sup> ed. 1990).

<sup>3</sup> Mr. Caruso's testimony at hearing made clear that the co-location of snowmobile trails along CMP corridors are not only used as a means of egress.

MR. MANAHAN: Isn't it true, Mr. Caruso, that the existing ITS 87 trail noted in your testimony is co-located with the existing CMP overhead transmission line?

GREG CARUSO: That's true.

MR. MANAHAN: And how many miles of ITS87 is co-located in the existing transmission line?

...

GREG CARUSO: I'm aware of -- in our area I would say from The Forks area north towards, I would say as far as Jackman, I would say on ITS87, five miles, ten miles maybe tops.

April 1 Tr. at 80:23-81:4, 81:17-20.



CMP, 600 miles of those transmission lines are co-located with existing snowmobile trails.<sup>4</sup>

As part of CMP's rebuttal testimony, Justin Tribbet stated the following relating to colocation of snowmobile trails within CMP's transmission corridors that was not refuted by any party.

CMP alone operates and maintains over 2,800 miles of overhead transmission lines and associated corridors in Maine. Throughout the state, overhead lines cross and are co-located with snowmobiles trails. Based on CMP's records, *over 600 miles of snowmobile trail segments co-exists within CMP's existing overhead transmission corridors, approximately 22% of the snowmobile trail system (2,700+/- miles of the 12,000+/- miles of trails) in Maine involve some portion of CMP's existing transmission line corridors.* There are just under 100 locations within CMP corridors where the Interstate Trail System (ITS) intersects or co-exists within CMP transmission corridors.

March 25, 2019 Justin Tribbet Rebuttal Testimony at 7 (emphasis added).

The Carusos have also asserted that the Project will adversely impact the snowmobiling industry due to the impact of the Project facilities on the scenic character of the area. Such a conclusion, however, is not supported by substantial evidence on the record. In fact, Ms. Caruso's own testimony would contradict this position. The top of Coburn Mountain, which she notes to be one of the more popular destinations attracting hundreds of tourists per day,<sup>5</sup> already has many manmade, unnatural, structures, which include a steel observation tower, solar panels, weather equipment towers, and

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<sup>4</sup> April 1 Tr. at 107:7-11.

<sup>5</sup> Ms. Caruso states:

One of the many scenic areas impacted ... is the Coburn and Johnson mountain area. The corridor will tear a strip along the Coburn Connector Trail and ITS 89, which are one the most popular destinations for snowmobilers. *On a busy day, hundreds of tourists snowmobiling to Coburn Mountain's 3800' observatory would be staring 360 degrees down at the vastness of this destructive corridor.*

February 28 2019 Direct Testimony of Elizabeth Caruso at 5:13-17 (emphasis added).

buildings, but these do not seem to deter snowmobilers from ascending Coburn.<sup>6, 7</sup> As shown below, a review of the January 8, 2019 Photo Simulation 44, which provides views from the Coburn Mountain observation tower, shows strip cuts, clear cuts and existing roads carving through the nearby landscape.<sup>8</sup>

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<sup>6</sup> At hearing, the following dialogue occurred.

MR. MANAHAN: On Page 3 of your rebuttal testimony you say that it may be common for snowmobilers to see transmission lines in some areas; however, this area has no, and you capitalized the word no, industrial infrastructure. What's located at the top of Coburn Mountain?

ELIZABETH CARUSO: What would you call it?

MR. MANAHAN: Is there a radio tower there?

ELIZABETH CARUSO: I haven't been there in a few years, so. I know there's weather equipment towers.

MR. MANAHAN: Is there a communications building there?

MS. MILLER: Hang on a sec, could you just turn the microphone towards you?

ELIZABETH CARUSO: Sure.

MS. MILLER: Thank you.

MR. MANAHAN: Are there solar panels there?

ELIZABETH CARUSO: I think so.

April 1 Tr. at 70:9-71:5.

<sup>7</sup> Mr. Meyers also testified to the presence of man-made, unnatural, features at the top of Coburn Mountain.

MS. GILBREATH: Can you describe to me what's located at the top of Coburn Mountain?

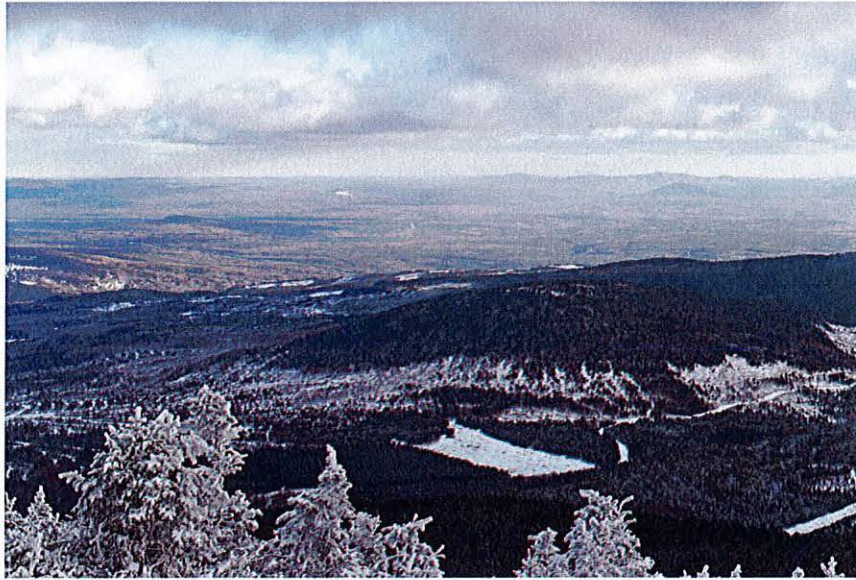
BOB MEYERS: Some very nice views, there's an observation tower. There's a number of radio transmitter stations. There's a small, I think at least one or two utility -- I have not been there in a year or two, but a utility building or two.

April 1 Tr. at 14:15-21.

<sup>8</sup> PhotoSimulation 44A, COBURN MOUNTAIN, OBSERVATION TOWER, Upper Enchanted Twp; available online at: [http://www.maine.gov/dep/ftp/projects/necec/info-since-2018-12-09/2019-01-09%20NECEC\\_COBURN\\_Tapered%20Veg%20Management\\_%20Study.pdf](http://www.maine.gov/dep/ftp/projects/necec/info-since-2018-12-09/2019-01-09%20NECEC_COBURN_Tapered%20Veg%20Management_%20Study.pdf)



**Figure 1: View From Coburn Observatory Looking East  
With Traditional Vegetation Management**



**Figure 2: View From Coburn Observatory Looking East  
With Tapered Vegetation Management**





**Figure 3: View From Coburn Observatory Looking South  
With Traditional Vegetation Management**



**Figure 4: View From Coburn Observatory Looking South  
With Tapered Vegetation Management**



These photo simulations clearly illustrate that the visual impact of the Project facilities, especially after taking into consideration CMP's tapered vegetation management, are hardly unreasonable and, in fact, are less intrusive than some existing fragmenting features such as clear cuts, strip cuts, roads, etc.

Other witnesses have provided similar evidence that transmission lines along the Project corridor, including areas along Coburn Mountain, are not only compatible with snowmobiling and other recreational activities, but also that such facilities provide a benefit to snowmobilers. Robert Meyers, Executive Director of the Maine Snowmobile Association for 23 years, stated the following in response to questioning at hearing:

MS. GILBREATH: Are you familiar with segment one of the NECEC project?

BOB MEYERS: Basically, yeah.

MS. GILBREATH: Would you characterize this area as pristine?

BOB MEYERS: No.

MS. GILBREATH: Would you characterize it as untouched?

BOB MEYERS: No.

MS. GILBREATH: Can you describe to me what's located at the top of Coburn Mountain?

BOB MEYERS: Some very nice views, there's an observation tower. There's a number of radio transmitter stations. There's a small, I think at least one or two utility -- I have not been there in a year or two, but a utility building or two.

MS. GILBREATH: Are there solar panels as well?

BOB MEYERS: Could very well be.

MS. GILBREATH: Is an electric transmission line in your opinion incompatible with snowmobiling use?

BOB MEYERS: I don't think so at all.

MS. GILBREATH: Are snowmobilers deterred by the existence of a transmission line?

BOB MEYERS: Absolutely not.

...

MS. GILBREATH: So is it fair to say that snowmobilers are accustomed to recreating in or near electricity transmission lines and related infrastructure?

BOB MEYERS: We have, like I said, 620 miles that are on or across CMP property in the state already. We have probably a similar amount in northern Maine with the company up there and yeah, I mean, the people who are out riding are looking to get from point A to point B and our clubs are looking to do it in the most cost effective and easy way possible.



April 3 Tr. at 14:6-15:7, 16:12-22.

During the evening portion of the April 4<sup>th</sup> hearing, Brian Bickford, a resident of Fairfield, Maine, and self-professed avid snowmobiler, testified in response to the purported concerns of intervenors regarding the scenic and aesthetic impacts of the Project while also describing what he saw to be potential advantages to Maine's snowmobiling experience:

As a snowmobiler, going through, I go through The Forks a lot, I kept seeing these signs no corridor, I'm like what -- I don't live on this corridor, but I kept bumping into it and even on the snowmobile trails I'm riding, stop the corridor. I couldn't figure out why...in snowmobiling I probably do 3,000 miles a year through all those logging roads everybody talks about, climbed every mountain, climbed every hill you can climb with a snowmobile, go to the Canadian border where it's all cut and I see -- every year we ride the trails and you come to a stop and it's totally clear, I mean, it's clearcut. Anybody that says it's pristine, they're standing next to a lake because it's not allowed to be cut there, but other than away from the lakes, it's mind boggling how much of this state gets cut up as it is.

This little piece of cut through here, when we go snowmobiling, you can go through the Coburn Gore, but you can't go any further. There's no way on a snowmobile to get to Jackman from there...I've been everywhere in the state, every county, every place, but this particular area ... except for near the Kennebec and Parlin Pond up towards Coburn Gore, there's no way to get there. I've never seen this land. I don't know how to -- to me it would be intriguing to have this open up and make another potential route for snowmobilers to travel from Jackman to The Forks.

April 4 Tr. (Evening) at 105:1 – 106:12. This testimony from Mr. Bickford presents a first hand, unbiased, and credible account for why the new corridor created by the Project will enhance recreational opportunities and help, not hurt, Maine's snowmobiling industry.

**C. The Project Meets the Department's Requirements Surrounding Wildlife Habitat and Fisheries and Will Not Unreasonably Harm any Significant Wildlife Habitat, and CMP's Compensation Plan Has Been Found Adequate to Address Such Issues.**

In determining whether to grant a permit for a proposed activity, the Department must find that the proposed activity must not “unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life.” 38 M.R.S. § 480-D (3). In order to meet certain standards for development, an applicant must demonstrate certain standards for development, which include adequate provisions “for fitting the development harmoniously into the existing natural environment and in order to avoid adverse effects on “existing uses, scenic character, air quality, water quality or other natural resources” in the vicinity of the proposed development. 38 M.R.S. § 484(3).

As part of its application, which has been amended to include a redesign of the transmission facilities through use of HDD beneath the Kennebec River, use of shorter poles in order to decrease visibility from scenic resources, and the proposed use of tapered vegetation management in certain areas, CMP’s Project will fit harmoniously into the existing natural environment and will not have any unreasonable adverse effect upon existing scenic, aesthetic, recreational or other uses or other natural resources. CMP has also made a prima facie showing that the Project will not unreasonably harm any significant wildlife habitat or fisheries, which has not been contradicted by any credible evidence. The pre-filed testimony of Mark Goodwin demonstrated that CMP has consulted with MDIFW, included MDIFW’s recommendations as part of CMP’s compensation plan and that there will be no unreasonable impact or adverse effects to wildlife due to diminished habitat connectivity.

As part of the application process, CMP consulted with the MDIFW to ensure that any potential habitat issues were satisfactorily addressed. As seen by Exhibit CMP-4.1-



A,<sup>9</sup> CMP sought to – and in fact did – satisfactorily address all wildlife habitat and cold water fisheries concerns of MDIFW. CMP's email inquiry stated:

Thank you for identifying remaining MDIFW resource issues in your December 21 email below, and for working with CMP to resolve these issues. Attached is a summary *of those remaining issues, their resolution, and where you can find documentation of those resolutions*. We have also included clarifications regarding MDIFW-related issues arising from our January 30, 2019 compensation plan and related discussions...

To ensure we are all on the same page, CMP requests that MDIFW confirm that the attached clarification materials address *all of MDIFW's remaining concerns, and that MDIFW is satisfied that the latest (January 30, 2019) NECEC Project Compensation Plan*, as supplemented by these attached clarifications, provides satisfactory mitigation of the NECEC Project's impacts.

Mirable/Connolly Email at 2 (emphasis added). In response to Mr. Mirable's inquiry, the MDIFW responded:

Thanks for the March 11 email as a follow-up to address the Department remaining resource impact concerns for the NECEC project. We appreciate your willingness to work with us *to finalize the complex fish and wildlife resource issues*. We have read your response and *accept the explanations provided in the March 11 email as sufficient to allow DEP to apply applicable natural resource law to the permitting process*.

Mirable/Connolly Email at 1 (emphasis added).

At hearing, CMP's witnesses confirmed that MDIFW was satisfied with CMP's compensation plan as it related to wildlife, including deer wintering areas, any impact on habitat fragmentation, and cold water fisheries.

MR. MANAHAN: I just have two quick questions. The first one is for Mr. Goodwin. We heard this morning, Mr. Goodwin, from Mr. Publicover and I think some other questions having to do with pine marten and fragmentation issues and some – in those questions some concerns were raised about the adequacy of the compensation plan. My question for you is what did the Department of Inland Fisheries and Wildlife say with

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<sup>9</sup> Exhibit CMP-4.1-A, referred to herein as the "Mirable/Connolly Email", was attached to the March 25, 2019 Lauren Johnston Rebuttal Testimony and consisted of a March 11<sup>th</sup> and 18<sup>th</sup> email exchange between Gerry Mirable and James Connolly on behalf of the Department.



respect to fragmentation issues and what concerns did they raise about that with --, with respect to the compensation plan proposed?

MARK GOODWIN: Obviously there was discussion about significant vernal pool habitat, which we have adequately addressed through siting minimization measures and the compensation. Beyond that, the discussion was limited to deer wintering areas, specifically the Upper Kennebec deer wintering area, you know, in terms of that habitat type requiring compensation.

MR. MANAHAN: So they didn't raise fragmentation as a concern?

MARK GOODWIN: Generally speaking, habitat fragmentation wasn't a big concern for IF&W other than for generally mostly deer wintering area.

MR. MANAHAN: Okay. The next question is for Ms. Johnston and that is a similar question with regard to Mr. Reardon's questions having to do with cold water fisheries and brook trout. Did IF&W express concern with the compensation plan? Were they ultimately satisfied with the compensation plan and how it addressed cold water fisheries?

LAUREN JOHNSTON: They were ultimately satisfied with the compensation plan and the proposed expanded buffers that -- that we provided in our most recent compensation plan in January of 2019.

April 1 Tr. at 291:16-292:25.

From the email exchange between CMP and the MDIFW (and Mr. Goodwin's and Ms. Johnston's testimony at the April 1 hearing), it is clear that the MDIFW found that CMP's revisions to its compensation plan sufficiently addressed wildlife habitat and cold water fisheries issues. No testimony or evidence has been submitted to refute or overcome these findings and recommendations of the MDIFW, which is the agency with knowledge and expertise on these issues. For these reasons, claims by certain intervenors that CMP has not provided sufficient travel corridors for pine marten or other species or that CMP has not adequately addressed cold water fisheries, including areas that might support brook trout, must be rejected. Any other interpretation would abrogate the role of the MDIFW, undermine its expertise and role in the permitting process, and would be arbitrary and capricious as it would be unsupported by any

rational or substantial basis. *Central Me. Power Co. v. Waterville Urban Ren'l. Auth.*, 281 A.2d 233, 242 (Me. 1971) ("Arbitrary or capricious action on the part of an administrative agency occurs when it can be said that such action is unreasonable, has no rational factual basis justifying the conclusion or lacks substantial support in the evidence."); *Associated Fisheries of Me., Inc., v. Daley*, 127 F.3d 104, 109(1st Cir. 1997) ("An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it -- for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise.")

**D. Existing Features Fragment the Habitat Along Segment 1 and Any Fragmentation Caused by CMP's Project is Not Unreasonable.**

As recognized by witnesses at hearing based on questions from Department Staff, there are already various features of the area adjacent to the Project, and the greater western Maine area, that cause greater habitat fragmentation when compared to the Project. These include the Spencer Road, other logging roads, large swaths of clear cut, strip cuts, and lay down areas. As CMP's witness acknowledged when examined on the photos depicted in the natural resource maps included as Attachment C to its August 13, 2018 Application, the area comprising the 54 miles known as segment 1 is hardly part of a large intact forest block, as alleged by some intervenors, but rather contains multiple logging roads, strip cuts, clear cuts and other features that fragment the habitat along portions of the Project far worse than the proposed corridor would.

MR. SMITH: ... I brought before you your application from August 13 and I have a question with regard to Attachment C. And in particular, I am



looking at essentially the natural resource maps for Segment 1 and I'm going to start on Page 9 of that document if you can reference it.

...

GERRY MIRABILE: Yes.

MR. SMITH: All right. So is there anything on that photo or on that depiction that would look like it's part of a large intact forest block?

GERRY MIRABILE: There are some very prominent strip cuts that -- and some skid trails and then there are smaller patches of what appear to be forest.

MR. SMITH: Anything else?

GERRY MIRABILE: Roads. Two roads. 400 Road and then another road that peels off from that that's not labeled.

MR. SMITH: And the difference between roads versus the strip cutting you're talking about is one of those a hard development versus a soft development?

GERRY MIRABILE: I would characterize roads as a hard development.

MR. SMITH: Okay. So you have both hard and soft developments in this location?

GERRY MIRABILE: Yes.

MR. SMITH: If you were to compare a totally vegetated area of this map to the area that is comprised by the clearcut, the hardscape of the road versus a world where it would just be the transmission line going through there, which one would comprise a greater area of cleared land?

GERRY MIRABILE: Well, that would take some mapping exercise to calculate that to quantify it specifically. I think roughly at this scale it appears that there might be equal between the two.

MR. SMITH: Okay. Let's go to the next page if you can, please. Page 10 of 417. Does this slide depict anything that would be considered a part of a large intact forest block?

GERRY MIRABILE: It appears to be laced with strip cuts, roads, skid trails.

MR. SMITH: Okay. Same roads that we were talking about before?

GERRY MIRABILE: One of the same roads, 400 Road and another road that is not -- is not labeled or identified.

MR. SMITH: Okay. Let's go two slides down to Page 12. I'll ask you the same question. Anything here that would depict an area that would be part of a large intact forest block?

GERALD MIRABILE: I would not characterize it that way.

MR. SMITH: Why not?

GERRY MIRABILE: Because large areas are either recently stripped based upon parallel lines -- I mean, recently a strip cut based on parallel lines or appear to have been cleared of trees.

MR. SMITH: So in other words, the areas that we're talking about here are actually not just simply strip cut, they're clearcut?

GERRY MIRABILE: It appears to be a clearcut from the photograph.

MR. SMITH: And are there roads on there as well?

GERRY MIRABILE: Yes, there are.

MR. SMITH: What roads?

GERRY MIRABILE: Lowell Town Road and 400 Road.

MR. SMITH: And if you were to compare essentially going back to the question I had earlier on slide 9, a world where it would just be the transmission line going through here versus a world where you have these hard developments and you have these heavily forested areas, which one would actually occupy a greater amount of space?

GERRY MIRABILE: I would expect in this case it would be the strip cuts and clearcuts just based upon the visual.

MR. SMITH: Okay. Let's go to Page 13. If I asked you the same question I asked you before with regard to this would it be the same?

GERRY MIRABILE: Yes, it would be the same.

MR. SMITH: And let's go to the next page. Would it be the same with regard to this map?

GERRY MIRABILE: Yes, it would be the same.

MR. SMITH: ... I'm not going to go through the 417 pages right now, I think we'd be here for a very long time. But would you say that generally the sort of representations that we've been going through are similar in nature to the various depictions you would see for [Segment 1]?

GERRY MIRABILE: Well, as Mr. Goodwin noted, it's a mosaic. It's a patch work and so, you know, we could find maps in here that were not and maps that are, but I think these are -- these might be considered typical.

April 1 Tr. at 260:5-10, 260:11-264:15.

Another obvious fragmenting feature in western Maine, having a much greater impact on wildlife habitat, is Route 201, which extends to the Canadian Border. Looking to other areas of Maine that are reliant on the forest products industry, including the Washington and Hancock counties which are host to the Stud Mill Road which runs



east-west, show examples of roads, electrical, and other utility infrastructure that causes much greater fragmentation than CMP's Project.<sup>10</sup>

**E. There is No Practicable Alternative That Would Meet the Project Purpose Under the Department's Rules.**

Under Title 38 and the Department's Rules, an applicant must demonstrate that a proposed project will not unreasonably impact "protected natural resources," as defined by the Natural Resources Protection Act ("NRPA"), in light of practicable alternatives to the proposal that would be less damaging to the environment.<sup>11</sup> Chapters 310, 315, and 335 set forth the applicable legal standard for practicable alternatives and require that an application show that there is no "practicable alternative to the activity that will have less visual impact"<sup>12</sup> or "would be less damaging to the environment."<sup>13</sup> Under DEP's Rules, "practicable" means "[a]vailable and feasible considering cost, existing

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<sup>10</sup> An additional fragmenting feature, which exacerbates problems with wilderness connectivity compared to the NECEC, is the colocation of a transmission line and gas pipeline along the Stud Mill Road. This colocation widens the overall development and corridor/road width, thereby creating greater impediments to habitat connectivity. Malcolm Hunter, at hearing, admitted that the Stud Mill Road is a "far more fragmenting" feature than this Project.

MR. BEYER: Wouldn't the Stud Mill Road be a far more fragmenting feature in the landscape than this would be and the associated infrastructure projects that are located next to it?

MALCOM HUNTER: Yes.

April 5 Tr. at 99:18-22.

<sup>11</sup> 38 M.R.S. §§ 480-D (1) & (3), 38 M.R.S. § 484(3), DEP Rules Chapters 310, 315, and 335.

<sup>12</sup> DEP Rules, Chapter 315, § 9 ("[T]he Department also considers the functions and values of the protected natural resource, any proposed mitigation, practicable alternatives to the proposed activity that will have less visual impact, and cumulative effects of frequent minor alterations on the scenic resource.")

<sup>13</sup> DEP Rules, Chapter 310, §5(A) ("The activity will be considered to result in an unreasonable impact if the activity will cause a loss in wetland area, functions, or values, and there is a practicable alternative to the activity that would be less damaging to the environment."); See also DEP Rules, Chapter 335, §3(A) ("An activity that would degrade the significant wildlife habitat, disturb the subject wildlife, or affect the continued use of the significant wildlife habitat by the subject wildlife ... will be considered to have an unreasonable impact if there is a practicable alternative to the project that would be less damaging to the environment.").



technology and logistics based on the overall purpose of the project.”<sup>14, 15</sup> In the present case, several intervenors have suggested that CMP failed to provide potential alternatives. Importantly, given the Department’s requirement that any alternative be less damaging, have less visual impact, and be “available and feasible considering cost, existing technology and logistics based on the overall purpose of the project,” the Department should reject these claims.

### **1. Undergrounding**

Additional undergrounding or use of HDD in other areas along Segment 1 are not practicable for many reasons. The record contains more than ample evidence that the likely increased costs of undergrounding the Project would result in the Project failing for economic reasons and that such alternatives present unreasonable technical and logistical challenges.

The cost of undergrounding the 54 miles along segment 1, assuming it was technically feasible, would be \$767.9 million. March 25, 2019 Thorn Dickinson Rebuttal at 13. CMP asserts that this cost increase would render the Project infeasible and defeat the purpose of the Project.

At hearing, during an attempt by counsel for an intervenor to suggest that CMP’s Project could be undergrounded – and be economical – like the Northern Pass, Mr. Dickinson summarized the economic realities of CMP’s Project.

MS. BOEPPLE: I’m still trying to understand these numbers. I’m trying to understand how it is that it’s so expensive for CMP to do this in Maine, but

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<sup>14</sup> DEP Rules, Chapter 335, §2(D) (“Practicable. Available and feasible considering cost, existing technology and logistics based on the overall purpose of the project.”).

<sup>15</sup> The Department’s regulations are similar to federal standards governing alternatives analysis, including the Clean Water Act. See 40 C.F.R. § 230.10(a)(2) (“An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.”).

somehow Eversource could do it in New Hampshire and the Clean Power Link could do it in Vermont. That's what I'm asking –

...

THORN DICKINSON: It is. And so we have a valuator report that was completed as part of the evaluation and the column that existed for all ranked projects was available and that I had a column in it that was the levelized dollar per megawatt hour benefits associated with each of the different proposals. So with that piece of information we can then evaluate what it -- what the additional cost would reflect to and our overall ranking. And so we're, again, the evaluator report was after Northern Pass had already been removed, so the subsequent evaluator report had us ranked number one. If you put the costs of underground in just the 53 mile portion, our rank would drop from one -- first to ninth.

April 1 Tr. at 129:8-13, 129:20-130:16. Mr. Gil Paquet, witness for Group 3, confirmed the significant cost implications of undergrounding transmission line along segment 1, both with regard to initial construction challenges as well as ongoing maintenance issues.<sup>16</sup>

Mr. Paquet also provided vehicular, access, technical and logistical challenges that would make undergrounding of segment 1 impracticable, and which would add to the environmental degradation caused during construction of the Project. At the May 9 hearing, the following colloquy ensued:

MS. GILBREATH: I heard you reference earlier an underground project that you worked on along a road that did not go forward due to the difficulties with undergrounding along that road, what were those difficulties?

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<sup>16</sup> Mr. Gil Paquet stated:

In general, underground construction costs five to seven times and much as overhead construction. Specific site conditions such as shallow rock and wetlands crossing can increase that price difference significantly. Any damage to a high voltage cable system requires substantial time to locate and repair and because of this underground transmission lines have increased risk for extended outages for extended operation. Underground construction has limited reductions and long-term impacts along the NECEC route due to the requirements for vegetation clearing.

May 9 Tr. at 341:18-342:4.



GIL PAQUETTE: Primarily access that was a big issue and thermal sand, so with access you couldn't use the road for access, it was prohibited so we basically had to go down -- down the right of way, so to speak. So that would require mats, you know, matting through wetlands and so forth. Hauling the thermal sand using the dump trucks, you know, that was just too costly to do that. You know, down -- down an area that would look just like, you know, the setting is here. Or actually worse in the Segment 1 corridor.

MS. GILBREATH: How is Segment 1 worse?

GIL PAQUETTE: Well, just the remoteness, the lack of access roads. I mean, the project I worked on there were a number of public roads that crossed, so those would be your access points to the right of way. You know, in this case, we're talking logging roads, maybe old skidder trails. That would need to get -- get worked on, get upgraded to allow vehicular traffic, trucks and so forth that are needed for building an underground project.

MS. GILBREATH: Okay. That probably gets -- you probably answered much of my next question, but let's see if there is more. You state at Page 7 your sur-rebuttal that for many in the transmission field not burying the NECEC would be an obvious conclusion given the project setting, that's what you're describing to me. What is it about that setting that makes not burying the NECEC an obvious conclusion?

GIL PAQUETTE: I would say topography, the remoteness, the lack of access being, you know, just logging roads, skidder roads, the distance to where the thermal sand may have to be hauled from. That has to be a special sand that meets a certain thermal resistivity to allow heat dissipation from the cable. So, you know, all those things, the streams, wetlands and so forth, it's just a number of things. So based on the work I did along the road wasn't feasible so how could something in the western mountains be feasible?

MS. GILBREATH: And when you mentioned the streams and wetlands you're talking about environmental impacts?

GIL PAQUETTE: Environmental impacts, yes. So crossing those streams because with the cable being continuous you can't span like you would with an overhead line, so you have to basically travel the length of the right of way from one end to the other to install that cable. So every stream would have to get bridged, every wetland would need to be crossed with mats. You wouldn't be able to get away with not installing mats in areas where, you know, there might be frozen ground or in uplands and so forth, you're basically matting and I think you'd have to have some leveling as well for safety purposes so that equipment wouldn't teeter or fall off the mats.

MS. GILBREATH: Are you aware of any similar constraints with regard to the construction process and impacts for taller structures where CMP is

not proposing taller structures would be an obvious conclusion given the project setting?

GIL PAQUETTE: I think that if that height limitation is reached such that we needed a caisson foundation, I think that's where you get into, you know, similar types of impacts from the -- from the road down the travel lane of the right of way, so you're having to bring concrete trucks in because you can't use precast type of foundations for that much weight and that much load, so you're bringing concrete trucks down the right of way. And I am not aware of the -- the areas that are being proposed, but I can imagine that if they're a deer wintering area, you know, if they were pristine areas and so forth that -- or areas that they want taller vegetation that they must be forested in that vicinity and so you're probably traveling down the right of way a bit of a ways with a concrete truck, a mixer and -- or you've got to get the mixer to the right of way, so I'm not even sure where there is a plant in that area and then you have to get it up to the right of way and then pour your load of concrete. And then you have to wash your concrete equipment, the mixer and so forth and that's done on the right of way as well, so there would be a, you know, concrete residue that would be on the right of way.

May 9 Tr. at 425:4-428:18

Mr. Paquet also contradicted certain intervenors' claims that the Project could be undergrounded beneath or along Route 201. At the May 9 hearing, Mr. Paquet stated:

Underground installation on Route 201 faces two additional challenges. Route 201 is a state highway and the Maine Department of Transportation Utility Accommodation Policy prohibits the construction of manhole entries within the travel lanes and restricts the construction of longitudinal installation within travel lines. There is insufficient space in the Route 201 right of way for installation of the line outside of the travel lanes. If you go to the next slide there. That image there is a 500 kV jointing bay. The jointing bays for this project would be the same height and width. They'd be about one segment shorter, it's about 7 feet.

In addition, construction of a duct bank system within Route 201 would have substantial impact to the public. Construction of a duct bank system in adjacent to travel lanes requires extensive lane closures to provide a safe working space. Extensive traffic control and substantial barriers are required to protect the public from the excavations and the workers from the public. Any time extensive traffic control is implemented, close coordination is required with emergency services to maintaining access along those major arteries.

May 9 Tr. at 342:5-343:3.



With regard to the portion of Project situated along the Appalachian Trail adjacent to Troutdale Road, this area is not within the P-RR zone and the Commission should find that this location is not implicated by the Project.<sup>17</sup> Under the Department's criteria, it should find that the Project has been co-located in an existing corridor that already has transmission lines and that any effect of the additional transmission line is not unreasonably adverse to and will not unreasonably interfere with the scenic character, existing scenic, aesthetic, and recreational uses of this area. Although the new transmission line will increase the footprint of transmission facilities and the structures will be larger and more prominent, this does not mean that the impact of the Project is unreasonable. The area already has significant transmission facilities and infrastructure. In addition, hikers would already be viewing the lines from a man-made roadway traveled by cars and other vehicles.

With regard to the two other Appalachian Trail crossings, the Project facilities qualify for a special exception by the LUPC because the Project, which will be adjacent to an existing transmission line in a corridor already shared by the Appalachian Trail, is not incompatible with hiking or other uses associated with the trail. The widening of the corridor and the addition of a new transmission line will not materially change the hiking experience in this location. Hikers' sentimentalities are not nearly as delicate as some of the intervenor groups now suggest in effort to defeat the Project. As shown by

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<sup>17</sup> Ms. Peggy Dwyer explained while summarizing an aerial photo offered by CMP that depicted the location of the new corridor in relation to the P-RR District in the vicinity of one of the Appalachian Trail crossings near Troutdale road that, although closely situated, the newly proposed corridor in this area is not in the P-RR subdistrict. See April 2 Tr. at 151:1 – 152:11. See also Applicant Cross 1. Only the current transmission facilities owned by CMP and located in the vicinity of Troutdale Road are located in the P-RR District.

CMP's Rebuttal Testimony, thru hikers of the Appalachian Trail must cross many transmission lines along their travels from Maine to Georgia (or vice versa):

[A]s of March 2014 there were 56 electric transmission line crossings of 230 kilovolts (kV) or more along the length of the AT, *equating to one 230kV (or greater) transmission line crossing for every 38 miles of trail length*. The number of transmission line crossings of the AT is even larger when considering transmission lines of less than 230kV. In Maine alone, there are five 115kV transmission line crossings of the AT.

March 25, 2019 Goodwin Rebuttal at 2.

Mr. Paquet also asserted an underground crossing of the Appalachian Trail would be an impracticable or unreasonable alternative, stating:

Specific to the Appalachian Trail crossing, underground construction is a not a practicable or reasonable alternative. As discussed earlier, increased -- underground construction would have increased environmental impacts, increased impacts to the public and increased cost to overhead construction. At the Appalachian Trail crossing, I would expect a horizontal directional drill to be required to cross Joe's Hole and the adjacent wetlands. This would require a large hydraulic rig to be set up next to the Appalachian Trail for several months causing significant noise and visual impacts.

May 9 Tr. at 343:4-16.<sup>18</sup>

Based on this record evidence, the Department should conclude that there is no evidence that the Project will *unreasonably* interfere with existing scenic, aesthetic, and recreational uses of areas adjacent to the Project, including the Appalachian Trail or areas along Segment 1, and should decline to order any undergrounding of the Project facilities. Underground alternatives are not reasonably available or feasible considering

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<sup>18</sup> It is worth further noting that use of undergrounding or HDD in the vicinity of Troutdale Road, near the Appalachian Trail, is not practical because the existing easement held by the National Parks Service ("NPS") prevents such infrastructure. While one may be curious as to why CMP did not consult NPS to determine if such an alternative could be pursued, it is unnecessary to answer this question or otherwise speculate as to whether NPS would agree to such an amendment to its easement. This is because, as demonstrated by Mr. Paquet and CMP's witnesses undergrounding the Project in this area (and other areas) would raise technical and logistical challenges that would be impracticable, would likely cause more harm to the environment, and would not meet the Project purpose.



cost, existing technology, logistics, and the overall purpose of the Project proposed by CMP.

## **2. Taller Poles, Taller and Greater Vegetation, and Increased Tapering**

Certain intervenors have suggested that CMP use increased pole height in order to enable taller vegetation, allow greater vegetation to enable habitat connectivity, and increased tapered vegetation management along other portions of segment 1 similar to CMP's proposed management in the vicinity of Coburn Mountain. While such alternatives may appear at first blush to be potential alternatives, they are not a "practicable alternative to the activity that will have less visual impact"<sup>19</sup> or "would be less damaging to the environment."<sup>20</sup> Increased pole height will require use of larger structures, would likely require concrete foundations, thereby increasing habitat destruction<sup>21</sup> and would also likely increase the visual impact of structures and conductors and other Project facilities.<sup>22</sup>

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<sup>19</sup> DEP Rules, Chapter 315, § 9 ("[T]he Department also considers the functions and values of the protected natural resource, any proposed mitigation, practicable alternatives to the proposed activity that will have less visual impact, and cumulative effects of frequent minor alterations on the scenic resource.")

<sup>20</sup> See DEP Rules, Chapter 310, §5(A), Chapter 335, §3(A), *supra* at 22-23, footnotes 13 & 14.

<sup>21</sup> Mr. Paquet, in response to a question as to the construction process required for taller poles, stated:

GIL PAQUETTE: I think that if that height limitation is reached such that we needed a caisson foundation...so you're having to bring concrete trucks in because you, can't use precast type of foundations for that much weight and that much load, so you're bringing concrete trucks down the right of way...you've got to get the mixer to the right of way, so I'm not even sure where there is a plant in that area and then you have to get it up to the right of way and then pour your load of concrete. And then you have to wash your concrete equipment, the mixer and so forth and that's done on the right of way as well, so there would be a, you know, concrete residue that would be on the right of way.

May 9 Tr. at 427:20-22, 24-428:3, 428:11-18.

<sup>22</sup> Mr. Dewan at the May 9 hearing stated:

We are here today to offer testimony in response to Question 16 of the Tenth Procedural Order, which calls for an evaluation of where, quote, locations where tapering vegetation versus taller overhead structures would be preferred within Segment 1.

Based on their assessment of the potential use of taller poles and increased vegetation within the corridor along segment 1, Mr. Dewan and Ms. Segal concluded that taller structures would likely be more visible from locations along segment 1 with the exception of the South Branch of the Moose River, the Tomhegan Stream, and the Cold Stream. May 9 Tr. at 165:11-15. Mr. Dewan and Ms. Segal also concluded that use of increased tapered management along additional portions of the Project would likely not provide significant benefits, with the possible exception of the Rock Pond access road, Whipple Brook, or Spencer Rips Road. May 9 Tr. at 165:16-19.<sup>23</sup>

Further, although it has been suggested by some intervenors, increased use of tapered vegetation management or increased poles in order to allow greater vegetation is unnecessary for increased habitat connectivity. Primarily relying on the testimony of Dr. Simons-Legard, intervenors assert that the additional forestry clearing as a result of the Project corridor will further stress a pine marten population that is already compromised due to forestry practices, leading to decreased habitat and viability of pine

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...

The sum of our testimony is to the effect that additional tapering or taller transmission structures are being evaluated for habitat protection, connectivity or other environmental considerations tapering would be preferable to taller transmission poles because of the potential for greater visual impacts associated with the taller structures when viewed from lakes, ponds, roads and elevated viewpoints.

May 9 Tr. at 153:17-22, 154:9-17. Ms. Segal provided further details in the areas identified along segment 1, including the nine sensitive resource areas identify by The Nature Conservancy, where taller poles may be helpful. May 9 Tr. at 153:22 – 165:19.

<sup>23</sup> The limited benefits of tapered vegetation management was explained by Mr. Dewan a the April 1 hearing:

TERRY DEWAN: It works best in this particular case when you're looking right down the line when you're trying to minimize or soften the effect of that wide open expanse, in most locations the line is screen running perpendicular to the viewpoint and so tapering the vegetation is not going to have the effect that it would as we saw from the view at Coburn Mountain.

April 1 Tr. at 340:16-23.



marten and that additional travel corridors are necessary to enable their travel through the corridor. Such a conclusion presumes that there is a suitable habitat for pine marten on both sides of the Project corridor. Importantly, maps provided by Dr. Simons-Legard as well as other documentation presented by intervenors support no such conclusion. No foundation has been presented to demonstrate when or how these maps were produced or show how these maps support a finding of suitability of habitat for pine marten in the area adjacent to the corridor.

Moreover, these maps appear to support the conclusion of CMP as they illustrate that the Project area already has significant fragmentation by roads, industrialized forestry practices (e.g., strip cutting, clear cutting, etc.), and other activities and that the suitability of the area for pine marten habitat is marginal. As Mr. Giumarro observed, the forests adjacent to the Project have been cut within the last 15 to 35 years, and are primarily in the “regeneration and seedling” stage; these forests are at most, in the intermediate-age and are not mature forests. May 1, 2019 Gino Giumarro Supplemental Testimony at 4. Mr. Giumarro concluded that these areas, at best, provide a marginal habitat for pine marten, and maintaining habitat connectivity for pine marten populations which may – or may not – exist on both sides of the corridor could capably be accomplished by CMP’s proposed use of riparian buffers and scrub shrub habitat. *Id.* at 4.<sup>24</sup> For this reason, taller poles and larger travel corridors would provide no meaningful linkage between adjacent sides of the corridor. *Id.* at 2.

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<sup>24</sup> Dr. Simons-Legard asserted in her Supplemental Testimony that “[t]he research literature is clear that pine marten avoid using narrow strips of forest generally, and the most relevant study suggests that marten would avoid habitat corridors less than ~400 feet wide (assuming the corridor otherwise contains appropriate marten habitat conditions).” Simons-Legard May 1 Supplemental Testimony at 2. Importantly, however, no research literature was cited or referenced in Dr. Simon-Legard’s Supplemental Testimony or provided by her at hearing. Conversely, Mr. Giumarro’s position that riparian buffers would be adequate to enable connectivity and sufficient travel corridors was supported by his own testimony an article that he referenced in his Supplemental Testimony (See Giumarro May 1 Supplemental Testimony

**F. There is No Alternative Site Both Suitable to the Proposed Use and Reasonably Available to CMP and the LUPC's Criteria Are Satisfied by CMP's Application and Proposed Routing.**

Under the LUPC's special exception criteria for utility facilities in the P-RR District, an applicant must demonstrate that "there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant." Chapter 10, § 10.23, I, 3, D. The "reasonable availability" and "suitability" of any alternative site must be evaluated given the technical attributes of CMP's proposed facilities, the impact of these facilities in light of buffering and or compatibility with other similar uses, and after consideration of the impact of any alternative site on the overall Project cost.

**1. Alternative Sites to Those Proposed by CMP in Areas Located Within the P-RR Subdistrict Are Not "Reasonably Available" to CMP or "Suitable" for the Project.**

The proposed Project facilities in Beattie Township would be approximately a quarter mile from Beattie Pond.<sup>25</sup> There is an existing access road within 400 feet of Beattie Pond. February 28, 2019 Gerry Mirable Direct Testimony 21. CMP summarized its efforts to locate the proposed line in an alternative area further from Beattie Pond as follows:

CMP attempted to negotiate an alternative alignment south of the Beattie Pond P-RR subdistrict through Merrill Strip Township, and offered landowner Bayroot LLC between 150% and 200% of fair market value, but was unable to reach mutually-acceptable terms with the landowner, which

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at 4; citing Payne, N. F., Bryant, F. (1998), as well as an additional study that he acknowledged during cross-examination at hearing. On cross-examination, Mr. Giamarro discussed a Species Assessment relating to American Marten conducted by the U.S. Department of Forestry, which reached similar conclusions that he has reached. For "low quality or marginal habitat" like the habitat adjacent to the Project, the travel corridor width is between 100 and 149 feet within mature stands and from 200 to 299 feet if the corridor is adjacent to opening or areas of no canopy and that riparian buffers provide suitable connectivity for marten habitats. See May 9<sup>th</sup> Tr. at 299: 10-303:17; Group 7 Cross Exhibit 2 (U.S. Dept. Forestry Species Assessment) at 5, 9, and 13 of 23. For these reasons, CMP's proposed use of the riparian buffers, along with the scrub shrub habitat and select areas of tapered management, will be more than adequate to allow habitat connectivity.

<sup>25</sup> Beattie Pond is an LUPC Management Class VI Lake (also referred to as a Remote Pond).



demanded almost 50 times fair market value. Re-routing north of Beattie Pond to avoid the P-RR subdistrict would result in approximately two miles of additional corridor and associated vegetation clearing, and would lead to potentially higher visibility from the pond, due to the higher elevations associated with Caswell Mountain to the north. Neither alternative route is suitable for the proposed use, and neither is reasonably available to CMP.

*Id.* at 21-22.

Mr. Paquet provided additional reasons for why underground construction along Beattie Pond would not be a practicable or reasonable alternative and why CMP's proposed modification (use of shorter poles to reduce visibility) was more reasonable in light of site conditions and other factors that would result in higher construction costs and greater environmental impact.

Underground construction would have increased environmental impacts, increased impacts to the public and increased cost compared to overhead construction. Specifically at Beattie Pond underground construction would have increased operational risk due to being 37 miles from paved roads. That distance limits the access for repair and maintenance crews particularly during winter and creates additional difficulties in impending remote monitoring. The next picture shown is a hydraulic reel loading trailer that's used to pull cable and we'd have to maintain access for a similar trailer. Underground construction would have limited benefits at Beattie Pond. The overhead line has already been designed to minimize most of the impacts.

May 9 Tr. at 344:1-15.<sup>26</sup>

With regard to the upper Kennebec River crossing area, as stated above, because the HDD facilities and termination stations are located outside of this subdistrict, it is unnecessary for the LUPC to consider any alternative sites for this crossing. Moreover, even if Project facilities were located within this subdistrict,

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<sup>26</sup> In addition, as shown by the Supplemental Testimony of CMP and Mr. Paquet, maintenance of the splice joints would require permanent concrete vaults for protection and for ongoing access and O&M. May 9 Tr. at 356:20-357:3; May 1, 2019 Bardwell Rebuttal, Figure 15; see also Exhibit CMP-11.1-A (showing dimensions and materials for direct buried installation, duct bank installation, and splicing vaults (a/k/a precast concrete joint bays)).

because the HDD design will completely buffer the transmission facilities from any incompatible uses in the P-RR District, and will be located 1,200 feet away from the river, there can be no alternative site that is more suitable.<sup>27</sup>

With regard to the P-RR subdistrict in the vicinity of Moxie Pond in Bald Mountain Townships, CMP provided the following evidence in its direct testimony to support a finding that there is no reasonably available alternative site for the Project facilities.

The Appalachian Trail crosses the transmission line (the National Park Service holds an easement on CMP fee-owned land) at three locations close to Moxie Pond in Bald Mountain Township. The configuration of the AT within and adjacent to an approximately 3,500-foot long portion of transmission line corridor prevented CMP from avoiding direct impacts to the P-RR subdistrict in this area. Any alternative alignments of the transmission line would result in crossings of the Appalachian Trail in one or more locations where there are currently no transmission line corridors. Co-location of the new transmission line within the existing transmission line corridor is therefore the least environmentally-damaging practicable alternative.

*Id.* at 22.<sup>28</sup>

For the above reasons, the LUPC should find substantial evidence supports a finding that alternative sites to those proposed by CMP in areas located within the P-RR subdistrict are not reasonably available to CMP or suitable for the Project.

## **V. CONCLUSION**

For the reasons set forth above, the Department should grant CMP permits for the Project under NRPA and the Site Location of Development Act based on a finding

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<sup>27</sup> As noted above, even if the Project facilities were within the P-RR crossing along the Kennebec Gorge, there are already existing uses within this subdistrict with which the Project facilities are compatible (e.g., Harris Station hydro-electric dam, powerhouse and other buildings, transmission lines and other electric infrastructure). March 25, 2019 Joe Christopher Direct Testimony at 1-2 and Exhibits 1-8 thereto, *supra* at 7.

<sup>28</sup> As stated above, with regard to the portion of Project situated along the Appalachian Trail adjacent to Troutdale Road, this area is not within the P-RR zone and the Commission should find, as a preliminary matter, that this location is not implicated by the LUPC's special exception and requirements that reasonably available and suitable alternatives not be available. *Supra* at 27, footnote 17.



that applicable criteria have been met and are supported by substantial evidence in the record. The Commission should also certify to the Department that the Project is an allowed use within the subdistricts in which it is proposed and that there is no alternative site which is both suitable to the proposed use and reasonably available to CMP and that CMP proposed to buffer the Project from any uses and resources within the affected subdistricts with which it may be incompatible. Proposed Findings of Fact for the Department's and the Commission's consideration related to the hearing topics are included in Appendix A. WM&RC reserves the right to provide further argument, either relating to the above hearing topics or other topics, and in response to any other parties' briefs.

Dated: June 14, 2019

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Ben Smith", is written over a horizontal line.

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## **Appendix A – NECEC Proposed Findings of Fact**

1. The purpose of the New England Clean Energy Connect (“NECEC” or the “Project”) is to deliver up to 1,200 MW of renewable electricity from Quebec, Canada to the ISO New England electric grid via an overhead transmission line and consistent with the terms of the 2017 Massachusetts RFP. (as to LUPC and DEP)
2. The Project is proposed along land that CMP already owns or controls, and the great majority of the Project is proposed to be collocated along existing CMP transmission corridors. (as to LUPC and DEP)
3. The Project has been designed and proposed to ensure that it will not have an unreasonable adverse impact on the scenic, aesthetic, navigational and recreational values of the areas that it crosses. (as to LUPC and DEP)
4. CMP’s design of the Project, including areas along the remote portion of segment 1 from Harris Station to the Canadian border, seeks to use natural buffers such as topography, existing vegetation, and other features to minimize the visual impact of the Project. (as to LUPC and DEP)
5. CMP has proposed buffer strips to minimize Project visual impacts, protect and maintain water quality, and facilitate movement of wildlife across adjacent areas of the corridor. (as to DEP)
6. Where the Project is located within the P-RR subdistrict, it will be sufficiently buffered from other uses, and or is not incompatible with existing uses within such areas, meeting the LUPC’s special exception criteria for utility facilities. (as to LUPC)



7. As has been found by the Maine Department of Inland Fisheries and Wildlife (“MDIFW”), the Project will not unreasonable harm or adversely impact wildlife habitat or travel corridors through habitat fragmentation. (as to DEP)
8. Disruption to wildlife has been minimized wherever possible, and the Project does not unreasonably affect the ongoing use of the Project area by existing wildlife, especially when compared to potential design alternatives.
9. CMP has included buffer strips around cold water fisheries to the satisfaction of MDIFW, which will also facilitate habitat connectivity along the corridor. (as to DEP)
10. There are no reasonably available or suitable alternatives to the proposed location and design of the Project that would minimize its impact upon the environment or the recreational, aesthetic, scenic or other character of Project areas without unreasonably increasing the costs and defeating the purpose of the Project. (as to DEP)
11. There is no reasonable alternative to the crossings of the outstanding river segments that would have less adverse effect upon these rivers. (as to DEP)
12. There are no alternative sites to the locations where the Project is located in the P-RR subdistricts that are both “suitable” to the proposed use and “reasonably available” to CMP. (as to LUPC)
13. CMP’s compensation and mitigation plan adequately compensates for all impacts to cold water fisheries, outstanding river segments, and wetlands that cannot be avoided, and no additional compensation has been recommended by the MDIFW for any unreasonable impact upon wildlife habitat. (as to DEP)